ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.	)	CC Docket No. 96-149
	)	
Further Notice of Proposed Rulemaking on Information Disclosure Requirements Relating to Section 272(e)(1).	)	

JOINT COMMENTS OF BELL ATLANTIC AND NYNEX ON PETITIONS FOR RECONSIDERATION

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JOINT COMMENTS OF BELL ATLANTIC[1] AND NYNEX[2] ON PETITIONS FOR RECONSIDERATION

In evaluating the petitions for reconsideration, the Commission should rely on the terms of the Act to guide its decision making. While two parties (BellSouth and U.S. West) ask the Commission to conform the Commission's order to the plain meaning of the language in sections 271 and 272, the remaining petitioners repeat proposals that are flatly inconsistent with both the language and the structure of the Act and that would serve only to impose additional burdens on their competitors. Those petitioners' proposals would harm consumers by impairing the local exchange carriers' (LECs') ability to compete generally, and in the long distance market in

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1 The Bell Atlantic Companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; and Bell Atlantic Communications, Inc. ("BACI").

2 The NYNEX Companies ("NYNEX") are New England Telephone and Telegraph Company; New York Telephone Company; and NYNEX Long Distance Company.

particular. As a result, the Commission should reject all of the petitions except those filed by BellSouth and U.S. West.

I. The Commission Should Not Hinder Long Distance Competition by Adopting Restrictions That Go Beyond The Safeguards In The Act

Section 272 of the Act sets out various specific provisions that control how a Bell company and its affiliates may offer long distance service. While the Act requires a Bell operating company ("BOC") to provide essential inputs on a non-discriminatory basis to all long distance providers, it also allows BOCs to offer consumers new benefits based on the LECs' own "potential efficiencies stemming from economies of scale."[3] This is the careful balance struck by Congress in section 272 and ignored by most of the petitioners.

Petitioners seek to expand upon Section 272's separation requirements by adding a number of provisions that are not contemplated by the Act. In each case, however, their arguments are without merit.

A. Some of the long distance incumbents claim that the Commission should reconsider its decision to permit the BOCs and their long distance affiliates to share administrative and other services or to obtain those services from a common affiliate.[4] As the

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3 ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272, First Report and Order***, CC Docket No. 96-149, ¶ 13 (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order").

4 ***See, e.g.***, AT&T Corp. Petition for Reconsideration and Clarification (filed Feb. 20, 1997) ("AT&T Petition"); Petition for Reconsideration of MCI Telecommunications Corp. at 8-10 (filed Feb. 20, 1997) ("MCI Petition").

Commission recognized, the petitioners are wrong, both as a matter of law and of sound public policy.

First, as a legal matter, petitioners are wrong that such restrictions are required by the Act -- either under section 272(b)(1) or (b)(3). In fact, as the Commission itself recognized, those provisions are "silent on the issue of shared services,"[5] and other provisions of section 272 expressly allow the long distance affiliate to exchange "goods, services, facilities and information" with the BOC (and other common affiliates). [6]

MCI argues that section 272(b)(3) precludes sharing of administrative services.[7] But section 272(b)(3) only prohibits common directors, officers and employees. To accept MCI's argument would bar ***any*** shared service or transaction between the BOC and the 272 affiliate -- a result that is inconsistent with the numerous provisions in section 272 that govern how such transactions should be structured.[8]

AT&T argues, based on the requirement in section 272(b)(1) that the long distance affiliate "operate independently" from the BOC, that the Commission must not only bar shared

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5 Non-Accounting Safeguards Order, ¶ 178.

6 47 U.S.C. § 272(c)(1).

7 MCI Petition at 8-9.

8 ***See*** 47 U.S.C. §§ 272(b)(5) (transactions between affiliate and BOC must be on an arms length basis), 272(c)(1) (BOC in dealing with affiliate may not discriminate in the provision or procurement of goods, services, facilities or information), 272(c)(2) (BOC shall account for all transactions with 272 affiliate in accordance with principles approved by the Commission), 272(e) (various nondiscrimination requirements concerning the provision by the BOC to the affiliate of interLATA and intraLATA services and facilities).

administrative services, but must also impose all the additional requirements it has imposed in other contexts where the same general rule applied. But AT&T's examples cut the other way.

For example, AT&T claims that the use of "operate independently" in section 274(b) means that the Commission must assume that the specific list of requirements found there are also requirements of section 272.[9] On the contrary, section 272(b) has its ***own*** specific set of requirements that AT&T has already conceded are "specific injunctions that each represent a particular attribute of operational independence."[10] While the section 272(b) list has some commonalties with the list in section 274, there are also significant differences.[11] AT&T cannot simply import the items from section 274 that Congress chose to exclude from section 272.

Likewise, AT&T also cites the Commission's interpretation of "operate independently" in the context of its Computer II and Cellular Structural Separation Rules.[12] In both of those cited examples, the Commission did not, contrary to AT&T's argument, adopt a whole new body of regulations to give effect to the term "operate independently." On the contrary, the Commission merely adopted a general requirement that the separate affiliate "operate independently," supplemented by specific rules tailored to the particular services involved. There is simply no basis for AT&T's claim that the Commission is obligated to impose the same supplemental requirements here. In fact, while ***some*** of these same rules were adopted by

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9 AT&T Petition at 6-8.

10 ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272***, CC Docket No. 96-149, Comments of AT&T Corp. at 19 (filed Aug. 15, 1996).

11 For example, section 274(b)(6) imposes circumscribed limits on the use of certain BOC names and trademarks by the non-regulated affiliate. There is no similar restriction in section 272, where joint marketing is specifically authorized (section 272 (g)).

12 AT&T Petition at 8-10

Congress as part of section 272, many others were modified or rejected.[13] In short, Congress already decided which of these rules should apply here, and the Commission's role is not to create a new body of rules, but rather to enforce the requirements already determined by the Act.

Second, as a policy matter, the Commission recognized that allowing a BOC and a section 272 affiliate to "achieve the economies of scale and scope inherent in offering an array of services" outweighs any speculative potential for discrimination.[14] Allowing the BOC and its long distance affiliate to share administrative and other services is a key element of these efficiencies. As Bell Atlantic demonstrated in its comments, failure to allow such efficiencies could raise consumers' cost by as much as 15%.[15] Petitioners offer nothing new in their arguments to justify forcing consumers to forgo those competitive benefits to protect petitioners' market position.

B. MCI and Teleport ask the Commission to reconsider its decision that the long distance affiliate should be allowed to offer local service. But as the Commission recognized with respect to this issue, "the text and the purpose of the statute are clear."[16] The Act expressly contemplates that the long distance affiliate may market or sell long distance service provided by the BOC. While there are some requirements imposed on an "incumbent LEC" that offers long distance and local service together, a section 272 affiliate does not meet the statutory definition

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[13] ***See e.g.***, 47 C.F.R. § 64.702(c)(2) (***compare*** requirement to maintain separate books of account (also a requirement of section 272(b)(2)) ***with*** requirement for separate marketing (joint marketing specifically authorized in section 272(g))).

[14] Non-Accounting Safeguards Order, ¶ 179.

[15] ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272***, CC Docket No. 96-149, Affidavit of William E. Taylor at ¶ 8, attached to Comments of Bell Atlantic (filed Aug. 15, 1996).

[16] Non-Accounting Safeguards Order, ¶ 312; 47 U.S.C.§ 272(g)(1).

for an incumbent LEC and there is no similar statutory restriction on it.[17] Thus, there is no basis for additional restrictions

C. MCI also argues that BOCs should be subjected to additional quality of service and performance reports to monitor compliance with section 272.[18] MCI makes this argument despite the fact that even it is forced to acknowledge that there are a number of structural and reporting safeguards already in place.[19] The Commission's order, however, recognizes what MCI chooses to ignore -- that the Act is quite specific with respect to the appropriate disclosure safeguards and there is no need to increase the burden on local carriers with supplementary requirements. While MCI disparages the effectiveness of the existing requirements, it ignores the actual impact of these requirements. For example, with respect to the complaint remedy, MCI argues that a complainant will lack the necessary information to prove its case, but the Commission has already placed the burden of production on the defending LEC. Through that burden and the normal discovery process, any complainant can obtain whatever information is appropriate to support (or refute) the complaint. MCI tries to bolster its argument for additional reporting burdens by citing the need for such information to do a "thorough review of Section 271 applications."[20] But again, the applicant must produce evidence to support its claim of

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[17] ***See*** 47 U.S.C. §§ 272(a)(1); 251(c) and 251(h)(1); ***see also*** Non-Accounting Safeguards Order, ¶¶ 311-314.

[18] MCI Petition at 10.

[19] ***Id.*** Among the existing safeguards acknowledged by MCI are "the biennial audit requirement, the need to demonstrate satisfaction of the conditions for in-region authority, the threat of the complaint remedy, other disclosure requirements and the possibility of incorporating performance and quality standards in local interconnection agreements." ***Id.*** at 10-11 (footnote omitted)

[20] ***Id.*** at 12.

compliance. MCI's arguments only demonstrate that the disclosure requirements already included in the Act are sufficient to implement the associated safeguards.

D. Without specifying exactly what it proposes, Cox argues for additional "accounting, CPNI and joint marketing rules."[21] Cox assumes that despite the move to price cap regulation, LECs will violate Commission rules in order to shift costs. Cox bases its claim on the attenuated possibility that if carriers were to return to a price cap regime with earnings sharing, the LEC would have an incentive to shift costs in order to reduce potential sharing obligations. This convoluted logic has been contradicted by economic testimony in numerous dockets where NYNEX, Bell Atlantic and others have demonstrated that a price cap regulated LEC "is no more able to cross-subsidize than an unregulated firm."[22] Indeed, when cable television companies like Cox are regulated by price caps, the Commission has not required ***any*** formal cost allocation, even though they could potentially return to cost-based regulation.[23] More fundamentally, Cox ignores the entire framework of section 272, which accepts the need for some separation and cost accounting rules for the time being to make doubly sure that cross subsidization cannot occur. Cox provides no basis for the Commission to impose an additional unspecified layer of regulation on top of those imposed by the Act.

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[21] Cox Communications, Inc. Consolidated Petition for Reconsideration at 4 (filed Feb. 20, 1997).

[22] ***Price Cap Performance Review for Local Exchange Carriers***, CC Docket 94-1, Reply Comments of Bell Atlantic, Affidavit of Alfred E. Kahn, ¶ 27 (filed June 29, 1994). ***See also, BOC Provision of Out-of-Region Interstate, Interexchange Services***, CC Docket No. 96-21, Bell Atlantic Reply Comments, Reply Affidavit of Robert W. Crandall, ¶ 8 (filed Mar. 25, 1996) (price caps "ameliorat[e] any legitimate concern over cross-subsidization").

[23] ***See*** 47 C.F.R. § 76.924(a) (cost allocation rules are not applicable unless company seeks a rate adjustment based on a cost of service showing).

E. Time Warner goes even further, and seeks to rewrite the Act to apply the section 272 separation requirements to the interLATA provision of video programming to subscribers -- exactly what was exempted from those requirements in section 272(a)(2)(B).[24] More precisely, while Time Warner acknowledges that "BOC provision of OVS platform services and transmission are the type of telecommunications service transmissions that Congress intended to exempt from section 272,"[25] it argues that the "video programming service itself" is not part of the exemption and can only be provided through a separate affiliate.[26] This is gibberish. To the extent that the programming is considered separately from the transport using the OVS platform, it is not an interLATA service. To the extent they are considered together, even Time Warner recognizes that the section 272 separation requirements do not apply. There is just no way consistent with the statutory language to reach the result sought by Time Warner. Indeed, concern over competitors' efforts to saddle LEC video services with unwarranted regulatory obligations underlie the Act's mandate that the OVS rules are "in lieu of, and not in addition to, the requirements of title II."[27]

II. The Commission Should Reconsider its Order to Reflect the Actual Requirements of Section 272

In contrast to the other petitions, the petitions of BellSouth and U.S. West seek reconsideration to align the Commission's order more closely with the actual terms of sections

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[24] Section 272(a)(2)(B) cites the definition of incidental interLATA services in section 271(g).

[25] Petition for Reconsideration/Clarification of Time Warner Cable at 6 (filed Feb. 20, 1997).

[26] ***Id.*** at 4.

[27] 47 U.S.C. § 573(c)(3).

271 and 272. For example, petitioners ask that the Commission revise its overly restrictive definition of marketing in section 271(e) and 272(f). Marketing is distinguished from sales in the Act, and must include more than the efforts made at the time of the initial sale. Thus, BellSouth correctly points out that product development and planning as well as service design may all be part of the marketing function.[28] Similarly, marketing activity can include efforts that take place after an initial sale.[29] The more narrow definition adopted in the order is contrary to a common sense reading of the Act's language.

Petitioners are also correct that interLATA information services that are provided out-of-region should not be subject to the section 272 separate affiliate requirement. As BellSouth demonstrates, interLATA information services clearly fall within the Act's definition of "interLATA services" because by definition, interLATA information services must include telecommunications that cross LATA boundaries.[30] As a result, these out-of-region interLATA services are specifically exempted from the separation requirements.[31]

In addition, BellSouth asks the Commission to modify its interpretation of section 272(b)(1) to eliminate the rule that prevents BOC employees from installing or maintaining equipment for a section 272 affiliate.[32] As BellSouth recognizes, Congress specifically included such a restriction in the context of electronic publishing (section 274 (b)(7)(B)), but made no

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[28] BellSouth Petition for Reconsideration at 8-9 (filed Feb. 20, 1997) ("BellSouth Petition").

[29] U.S. West Petition for Reconsideration at 5-7 (filed Feb. 20, 1997).

[30] BellSouth Petition at 11-13.

[31] 47 U.S.C. § 272(a)(2)(B)(ii). Based on this statutory mandate, the Commission should deny the Petition of ALTS which seeks rules that memorialize the Commission's erroneous application of the section 272 regulations to an out-of-region service.

[32] BellSouth Petition at 5.

similar limitation in section 272. Moreover, section 272 only governs the relationship between the long distance affiliate and the BOC -- as specifically defined in the Act.[33] There is no room to extend restrictions to other affiliates as the Commission did in its order.

In an appeal of this order, Bell Atlantic has challenged the Commission's failure to recognize an operating company's right to provide interLATA service and facilities to its long distance affiliate under section 272(e)(4).[34] If the Court or the Commission overturns the limits on an operating company providing interLATA service or facilities to the 272 affiliate, then those aspects of the Commission's order that limit operation and maintenance of interLATA service (whether by a BOC or other affiliate employee) would also.[35]

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[33] ***See*** 47 U.S.C. §§ 272(b); 153(4).

[34] Motion for Summary Reversal of for Expedition, ***Bell Atlantic v. FCC*** (D.C. Cir., No. 97-1067) (filed Feb. 11, 1997).

[35] It would also nullify MCI's flawed argument that BOCs should not be allowed to transfer any official services interLATA facilities to their section 272 affiliate. MCI Petition at 4-5.

Conclusion

Consistent with the terms of the Act, the Commission should reconsider its order and grant the petitions of BellSouth and U.S. West, but deny the remaining petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 1997 a copy of the foregoing "Joint Comments of Bell Atlantic and NYNEX on Petitions for Reconsideration" was sent by first class mail, postage prepaid, to the parties on the attached list.

Tracey M. DeVaux

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